

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 132-08

DECISION

IN THE MATTER OF THE APPEAL OF:

DOUGLAS LOTTIE,
Appellant,

vs.

**DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT
DIVISION,** and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Doug Lottie, appeals a two-day suspension, assessed by his employer, the Department of Public Works, Wastewater Management Division (Agency) on December 2, 2008, for alleged violations of specified Career Service Rules. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on February 3, 2009. The Agency was represented by Robert D. Nespor, Assistant City Attorney, while the Appellant represented himself. Agency exhibits 1-11 were admitted. The Appellant presented no additional exhibit. David Huntsinger and the Appellant testified for the Agency. The Appellant presented Jimmy Hermosillo as his only additional witness.

Prior to hearing, the Appellant stated he wished to present his witness first. I fully advised him regarding the order of presentation of the case and of the Agency's burden to prove its claims against him. In that regard, I advised the Appellant that, by presenting his case first, the Appellant could, inadvertently, help the Agency prove its case. The Appellant understood the risks of presenting his case out of order. After waiving his right to appeal on the basis of the order of presentation of the case/burden of proof, the Appellant presented his witness, Jimmy Hermosillo, first.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A., B., J., K., S., or Z.;

- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend the Appellant for two days conformed to the purposes of discipline under CSR 16-10;

III. FINDINGS

The pertinent facts are not in dispute. The Appellant is employed as a Utility Worker by the Agency. His direct supervisor at all times pertinent to this appeal was Jimmy Hermosillo. On October 27, 2008, the Appellant attended a scheduled training session from 7:00 a.m. to 10:30 a.m. At the end of training, he did not return to work. His shift was to end at 3:00 p.m. He did not tell any supervisor he would not return and did not request leave for his absence.

The Agency sent a notice, dated November 10, 2008, in contemplation of discipline to the Appellant. A pre-disciplinary meeting was held on November 18, 2008. The Appellant attended with legal counsel and presented verbal and written statements. The Agency sent its notice of discipline on December 2, 2008. This appeal followed, timely, on December 8, 2008.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. b., as a direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend the Appellant for two days complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the agency needs to establish each of the following by a preponderance of the evidence: 1) the Appellant had an important work duty; 2) the Appellant was heedless or unmindful of that duty; 3) no external cause prevented the Appellant's performance of that duty; 4) the Appellant's failure to execute his duty resulted in significant potential or actual

harm. In re Martinez, CSA 30-06, 4-5 (Order 10/3/06). See also In re Simpleman, CSA 31-06 (Order 10/20/06). The Agency claimed the Appellant violated this rule by taking unauthorized leave following his authorized training session.

Important work duty.

The duty to show up for, and complete, daily work is fundamental to any position. The Appellant did not dispute this was important duty.

Heedless and unmindful.

The Agency claims the Appellant's failure to return to work after training on October 27, 2008, without an excused absence, was heedless and unmindful of his fundamental work duty, above. The Appellant replied he was only following the protocol established the previous year, when all training attendees were excused for the remainder of the day. He also stated another reason for not returning to work was he felt ill the morning of training, so he went home after the meeting. [Exhibit 4-1; Appellant cross-exam].

The Director of Operations, Reza Kazemian, testified he checked on the Appellant's claim that after the training session last year he was allowed to leave. The Appellant's work order for that day shows the Appellant did return to work and finished his shift after the training for the previous year. [Kazamian testimony; Exhibit 2-3]. The Appellant did not refute this testimony. This element is established.

External cause.

The Appellant claimed he had recent oral surgery and his gums began bleeding during the training session. [Exhibit 4-1], so he called his doctor after training, obtained a prescription and went home. I find nothing in the Appellant's claim to justify his failure to notify a supervisor that he required sick leave. In addition, the Appellant did not provide a doctor's letter to justify his need for sick leave. Thus, I find no external cause in the evidence which would have prevented the Appellant requesting leave.

Significant potential or actual harm.

The failure of an employee to report to work without an excused absence places an undue burden on the remainder of the shift team. The Appellant presented no evidence to the contrary. Where the Agency established the Appellant took an unexcused absence, and some harm resulted, the Appellant was neglectful of his duty to be present at work, in violation of CSR 16-60 A.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant's acts (performance), rather than omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty. Since the Agency alleged the Appellant violated this rule for failing to return to work, his absence is not a violation of this rule.

3. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

Kazemian testified without rebuttal that the day the Appellant failed to return to work, he was to join his work crew to perform field work. The Appellant's failure to return to work to complete his assignment was a violation of CSR 16-60 J.

4. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency claimed the Appellants failed to meet the following PEP standards.

ACCOUNTABILITY AND ETHICS

Baseline Duty

-Employee accepts personal responsibility for their [sic] actions, decisions, and behaviors; ensuring performance contributes to the standards and goals of the City and County, Mayor, Public Works, Organization and work section as a whole.

Kazemian testified, without rebuttal, that employees are paid eight hours to produce eight hours of work, and any less requires an accounting. The Appellant's failure to take responsibility for his failure to seek approval, before taking a partial day off, violates this directive, in violation of CSR 16-60 K.

5. CSR 16-60 S. Unauthorized absence from work...

The same evidence which established a violation of CSR 16-60 A., above, also establishes the Appellant took an unauthorized absence from work on October 27, 2008, in violation of CSR 16-60 S.

6. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove the Appellant's conduct hindered the agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). An agency's work is prejudiced under the first part of this rule if it is hindered in its ability to perform its mission. In re Compos, CSA 56-08, 15 (12/15/08), *citing In re Catalina*, CSA 35-08, 8 (8/22/08). The Agency did not provide such evidence.

The second part of this rule is violated only if there is actual injury to the city's reputation or integrity. In re Compos, CSA 56-08, 15 (12/15/08), *citing In re Catalina*, CSA 35-08, 8 (8/22/08). The Agency failed to present such evidence. The Agency failed to establish a violation under CSR 16-60 Z.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

The Appellant has an extensive disciplinary history, including:

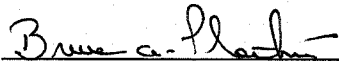
- 1994: 30-day suspension for a positive drug test
- 1997: a written reprimand for failure to maintain a satisfactory working relationship with co-workers;
- 1997: a verbal warning for unauthorized leave & failure to assist his crew;
- 2000: two-day suspension for refusing a direct order from his supervisor;
- 2001: 15-day suspension for threatening and intimidating a supervisor;
- 2003: a verbal warning for unauthorized leave;
- 2007: a verbal warning for unauthorized leave;
- 2007: written reprimand for unauthorized leave.

In light of the Appellant past disciplinary history, including a similar violation within the past year for unauthorized leave, the Agency's choice of a two-day suspension was neither excessive, nor based substantially upon considerations unsupported by the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing In re Delmonico*, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's assessment of a two-day suspension against the Appellant on December 2, 2008, is AFFIRMED.

DONE March 9, 2009.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail or hand delivery as follows:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202